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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 973

FOOD FAIR STORES, INC., a Foreign Corporation Authorized to Do Business in Florida, and POMPANO FAIR REALTY CO., a Florida Corporation,
Appellants,

vs.

THE ZONING BOARD OF APPEALS OF THE CITY OF POMPANO BEACH, FLORIDA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

APPELLANTS' REPLY BRIEF IN OPPOSITION TO MOTION TO DISMISS

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QUESTIONS PRESENTED BY APPELLEE'S MOTION TO DISMISS

(1) Whether this appeal, having been taken from the Supreme Court of Florida, is within the jurisdiction of the Supreme Court of the United States as required by 28 U.S.C.A., § 1257 (2)?

(2) Are the questions presented in the jurisdictional statement of the Appellants substantial federal questions?

STATEMENT OF THE CASE

Appellee's addition to the statement of the case is accepted with the exception of the conclusion drawn therein that the denial of Appellants' petition for Writ of Certiorari by the Supreme Court of Florida passed only upon the jurisdictional question and not upon the merits of the cause. This matter is treated in argument below.

ARGUMENT

(1) Whether this appeal, having been taken from the Supreme Court of Florida, is within the jurisdiction of the Supreme Court of the United States as required by 28 U.S.C.A., § 1257(2)?

It is quite correct that Appellant invoked the jurisdiction of the Supreme Court of Florida upon the contention that the opinion of the District Court of Appeal was in direct conflict with several enumerated opinions of the Supreme Court of Florida. However, it is Appellants' contention that the conflict between those cases and the case at bar, as set out below, was so patent that of necessity the Supreme Court of Florida considered the conflict and affirmed the District Court of Appeal by its act of denying the Writ of Certiorari sought by Appellants.

Appellee's contention that the Supreme Court of Florida never passed on the merits of the constitutional questions presented is founded on the fact that Appellee never filed nor was it requested or required to file a brief on

the merits. However, the failure to file a brief on the merits and the choice to restrict the brief to the question of jurisdiction was a calculated risk by the Appellee. The Florida Appellate Rules make no provision that a Respondent may file a brief as to jurisdiction only and then have the privilege of filing a brief on the merits when jurisdiction is accepted; nor is it true that the Supreme Court of Florida may request or require an additional brief on the merits.[1] The mere fact that Appellee (Respondent) prevailed in the Supreme Court of Florida without a brief on the merits is no more an indication that the court failed to reach the merits than if Appellee had ventured the risk not to file a brief at all. If we were to assume that Appellee's logic is correct, then in any case where there is but one point on appeal if the Appellee refused to file a brief on the point, the Court could not decide the issue.

In regard to the principle that a city may not by ordinance or action thereunder deny the use of property to one group while allowing others similarly situated to enjoy the use, Appellant presented the following cases to the Supreme Court of Florida as being in principle directly in conflict with the case at bar: *Kass* v. *Lewin*, 104 So.2d 572 (1958); *Liquor Store* v. *Continental Distilling Corp.*, 40 So.2d 371 (1949); *Caldwell* v. *Mann*, 157 Fla. 633, 26 So.2d 788 (1946); *City of Eau Gallie* v. *Holland*, 98 So.2d 786 (1957).

In *Kass* v. *Lewin*, 104 So.2d 572 (1958), the Court struck down a state statute which required the platting of certain lands while not requiring the same of other lands

1. Fla. App. Rules 4.5 c. Certiorari: (3) Respondent's brief and Cross Petition: ". . . The Respondent shall file his brief in opposition to the writ . . . and serve a copy thereof on the petitioner within 20 days after he has been served with a copy of petitioner's brief." (See Appendix.)

and wherein no public purpose was served and unequal burdens were cast upon similarly situated property owners. The Supreme Court of Florida found the statute to be violative of the equal protection clauses of both state and federal constitutions.

In *Liquor Store* v. *Continental Distilling Corp.*, 40 So.2d 371 (1949), the Supreme Court of Florida struck down injunctive relief granted under a price-fixing contract entered into under the Florida Fair Trade Law, a police power measure. In protecting "name brand products" the Court found that the law in its operation and effect was arbitrary and unreasonable, violating the right to own and enjoy property. The Court stated that a police-power measure "[t]o be valid . . . must apply to the general public as distinguished from a particular group or class. The idea of general welfare should banish the thought that the state may subordinate the right of one group of citizens to advance the welfare of another. . . . These principles are fundamental."

In *Caldwell* v. *Mann*, 157 Fla. 633, 25 So.2d 788 (1946), under circumstances where certain state statutes prohibited possession, sale or offering for sale of mullet during a specified period of time in certain inland counties, while allowing such acts in other inland counties during the same period of time, the Florida Supreme Court found no reasonable classification and held that imposing burdens on some citizens of the state that in kind or extent are not imposed on other citizens of the state under practically similar conditions, with no conceivable just basis for the classifications or discriminations, constitutes a denial to those injuriously affected of the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution.

The conflict of decisions was most evident in *City of Eau Gallie* v. *Holland*, 98 So.2d 786 (1957). In that case the Supreme Court of Florida invalidated the action of a city which denied a trailer park license to the plaintiff while at the same time granting licenses to others similarly situated, terming such action arbitrary and discriminatory.

The conclusion is inescapable that the cases cited directly conflict with the case at bar. The Supreme Court of Florida could not help but consider the conflict and decide it, albeit that it chose to affirm the District Court by denial of the writ sought.

Appellant next addresses the question of the meaning of 28 U.S.C.A., § 1257, which states:

> "Final judgments or decrees rendered by the highest court of a State in which a decision *could be had*, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Appellee contends and cites cases allegedly in support of the proposition that the highest court of the State of Florida in which a decision of this matter "*could be had*" is the District Court of Appeal and not the Supreme Court of Florida. Appellant submits that the cases cited are distinguishable, but that if applicable they are a perversion of the plain meaning of the words "*could be had*" in 28 U.S.C.A., § 1257, and urges this court to correctly take jurisdiction of this case in accordance with that plain meaning.

Referring to the cases cited by Appellee we consider first *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347

U.S. 157, 74 S. Ct. 396, 98 L. Ed. 583. Therein, the court looked to *Texas law* and determined *thereunder* that refusal of the writ of error sought by appellant by the State Supreme Court was a denial of jurisdiction making the next court below the highest court in which a decision could be had. In the case at bar it is not true that denial of a petition for a Writ of Certiorari in Florida is a denial of jurisdiction. The reasons for appellant's contention are set forth above; and appellee has cited no Florida cases to indicate that the denial of certiorari by the Florida Supreme Court must perforce be on jurisdictional grounds only.

In *American Ry. Exp. Co.* v. *Levee*, 263 U.S. 19, 44 S. Ct. 11, 68 L. Ed. 140, cited in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert, under Louisiana law* it was necessary to conclude that refusal of Certiorari by the Supreme Court of Louisiana was a jurisdictional decision, but this does not lead to the conclusion that Florida law operates in the same fashion.

In *Western Union Telegraph Co.* v. *Crovo*, 220 U.S. 364, 31 S. Ct. 399, 55 L.Ed. 1082, because of indecision, appellant appealed from both state courts below, appellate and trial. This court granted the writ to the trial court, but did not decide that if Appellant had taken the writ from the appellate court only, that it would have declined jurisdiction altogether.

In *Lone Star Gas Co.* v. *State of Texas*, 304 U.S. 224, 58 S. Ct. 883, 82 L.Ed. 1304, it is true that this court's mandate was directed to the Court of Civil Appeals after the Supreme Court of Texas refused a writ of error. However, this court could have directed the Supreme Court of Texas to grant the writ and proceed in accordance with this court's opinion if appellant had appealed from the

denial of the writ of error by the Supreme Court of Texas. Since appellant had not appealed the decision of the latter court, it was not necessary to direct that court to comply with the mandate of this Court. Moreover, as Appellee points out "the present Texas procedural provisions [were] in effect", and Texas law may require the view that the Court of Civil Appeals was the proper court from which to appeal. This rule, however, as stated above, is not binding on Florida.

Appellant further contends that the position taken in the above cases, with the exception of *Western Union Telegraph Co.* v. *Crovo*, is derived from the opinion of this Court in *Norfolk & Suburban Turnpike Co.* v. *Comm. of Virginia*, 255 U.S. 264, 32 S. Ct. 828, 56 L.Ed. 1082. In dictum in that case, this Court chose to set out its policy by a rule to operate in futuro; that is, the Court announced that it would thereafter simplify jurisdictional problems of deciding from which state court an appeal should be taken by limiting itself to the face of the record. In that very case, however, the court acted in opposition to its rule and granted a writ of error to the Supreme Court of Appeals of the State of Virginia which in turn had *refused* a writ of error to the court below. It is clear that the court was not ruling on a jurisdictional issue but merely setting out a rule of court. Had the question been one of jurisdiction the court would have been obliged to decline jurisdiction. This was not done.

Appellants submit that although this court has endeavored to follow the *Norfolk* rule, it has, for convenience of the Court, chosen to deny the right of appeal set out explicitly in 28 U.S.C.A., § 1257. Appellants suggest that justice is denied when this court forces an appellant at his peril to select the court below from which to appeal on the basis of a rule of convenience detached from the

applicable law of the state from whose courts the appeal is taken.

In the alternative, Appellants further contend that the plain meaning of the words "could be had" in 28 U.S.C.A., § 1257, have been interpreted to mean "was had" and that such interpretation is another "rule of court" used to limit jurisdiction in spite of the express meaning of the statute. While it is true that Congress may limit or eliminate the appellate jurisdiction of this Court, Appellants submit that the Court should not further narrow its appellate jurisdiction so as to deprive litigants of a statutory right.

By definition[2] the word "could" when used with an infinitive as an auxiliary of predication (as it is used in 28 U.S.C.A., § 1257) means "to be able", "to have the power, ability or capacity." Within the obvious meaning of these words, if it is true that a state appellate Court may, within its discretion, accept or decline jurisdiction, then the very existence of the power to accept jurisdiction means that a decision "could be had" in that court.

Knowing that the Supreme Court of Florida had the power to exercise jurisdiction, as admitted by the Appellee, it follows that a decision "could be Had" in that court. Whether or not a decision "was had" is immaterial under a plain meaning interpretation of § 1257.

(2) Are the questions presented in the jurisdictional statement of the Appellants substantial federal questions?

In response to Appellee's argument in regard to the substantiality of the federal questions involved, Appellants

2. Oxford English Dictionary, Vol. II, Oxford Press, 1933.

reassert the argument set out in the Jurisdictional Statement, adding only that the cases cited by the Appellee fail to reach the essential issues advanced by Appellant.

For the foregoing reasons Appellants respectfully submit that Appellee's Motion to dismiss should be denied and urge the Court to take jurisdiction of this case.

Respectfully submitted,

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APPENDIX A

Florida Appellate Rules

Rule 4.5. Extraordinary Writs: Mandamus, Certiorari, Prohibition, Quo Warranto, Habeas Corpus, and Stay Writs.

c. Certiorari.

(1) **Petition to Be Supported by Transcript and Brief.** Application for writ of certiorari shall be by petition filed in the Court within 60 days from the rendition of the decision, order, judgment or decree sought to be reviewed. Unless otherwise ordered by the Court, it shall be accompanied by a certified transcript of the record of the proceedings the petitioner seeks to have reviewed or so much thereof as is essential. Unless shown by the respondent or his attorney to be necessary, no other record shall be required. The petition shall contain a concise statement of the cause and the reasons relied on for granting the writ. It shall be accompanied by a supporting brief prepared as provided by Rule 3.7.

(2) **Respondent to Be Served with Petition, Transcript and Brief.** Unless otherwise ordered by the Court, a copy of the petition, transcript, and brief shall be served on respondent or his attorney on or before the time the application is filed with the clerk of the Court.

(3) **Respondent's Brief and Cross-petition.** If the respondent desires to have reviewed any adverse ruling in the decision, order, judgment or decree under review, he shall, within 20 days from the service on him of the documents provided in paragraph (2) of this rule, serve on petitioner a copy of his cross-petition for certiorari which shall be prepared in accordance with the requirements of

the original petition, and such additional portions of the record as may be essential to such review.

The respondent shall file his brief in opposition to the writ and, where a cross-petition is filed, in support of his cross-petition and serve a copy thereof on the petitioner within 20 days after he has been served with a copy of petitioner's brief.

(4) **Reply Briefs.** Petitioner shall file such reply brief as he deems necessary, and serve a copy of the same on respondent, within 10 days after he has been served with a copy of respondent's brief.

Respondent shall have five days thereafter to file a reply brief in support of his cross-petition.

(5) **Oral Argument.** Except hearings for review of workmen's compensation orders the petition shall be set down for oral argument as directed by the Court on some motion day after the time allowed petitioner herein to file his reply brief; and, unless further proceedings are ordered by the Court, the cause shall be finally disposed of without further oral argument.

Review of workmen's compensation orders pursuant to statute and Rule 4.1, shall be set for hearing on regular oral argument days in accord with the provisions of Rule 3.10(a)-(e).

(6) **From District Court to Supreme Court.** Where any decision of a district court of appeal (1) affects a class of constitutional or state officers, or (2) passes upon a question certified by such district court to be of great public interest, or (3) is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, petition may be filed with the Supreme Court to issue a writ of certiorari to review such decision.

The petition for certiorari under this rule shall be filed in the Supreme Court within 60 days from the rendition of the order, decision or judgment of the district court of appeal. The petition shall set forth briefly and clearly the grounds for invoking jurisdiction of the Supreme Court and the facts relied upon for the issuance of the writ. Unless the district court shall otherwise direct for good cause shown after notice and hearing, a petition for certiorari filed in the Supreme Court within 15 days from the date of the filing of the order, decision or judgment sought to be reviewed or within 15 days from the date of the disposition of a petition for rehearing shall automatically stay further proceedings in the district court and the trial court until the disposition of said petition by the Supreme Court; otherwise such petition for certiorari shall operate as a stay of such proceedings only upon the order of the Supreme Court after due notice to the adverse party.

Only so much of the record as shall be necessary to show jurisdiction in the Supreme Court and establish facts relied upon by the petitioners shall be attached to or filed with the petition. See rule 7.2i (Forms) for suggestions as to proper portions of record to be transmitted with petition for certiorari.

Copy of petition with certificate of filing the same in the Supreme Court shall be filed in the district court of appeal.

Copy of petition, supporting portions of the record and brief shall be served on respondent or his attorney on or before the time petition is filed with the Clerk of the Supreme Court. The respondent shall file his brief in opposition to the writ and serve a copy thereof upon the petitioner within 20 days after he has been served with a

copy of the petition, supporting portions of the record and brief of petitioner.

The Supreme Court shall consider the petition, supporting record or portions thereof and briefs and if the Court shall not have jurisdiction or if the petition is without merit, shall deny the same. If the Court determines to entertain further proceedings, the Court will set the same for oral argument on a day certain and at said time may order the filing of such further record or briefs as it may deem desirable for proper disposition of the cause, or that, upon motion of either party, it may determine is essential therefor. Petitioner shall file such reply brief as he deems necessary and serve a copy of the same on respondent within 10 days after he has been served with a copy of respondent's brief.

PROOF OF SERVICE

I, HARRY SHAPIRO, 306 South Nineteenth Street, Philadelphia 3, Penna., one of the attorneys for FOOD FAIR STORES, INC., and POMPANO FAIR REALTY CO., appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of May, 1963, I served a copy of the foregoing Appellant's Reply Brief in Response to Appellee's Motion to Dismiss on the Zoning Board of Appeals of the City of Pompano Beach, Florida, Appellee herein, by mailing said copy in a duly addressed envelope with first class postage prepaid to the Appellee's, Attorney of record, ROBERT B. COCHRAN, ESQ., care of Bruno Di Giulian, City Attorney, 101 S. W. 1st Avenue, Pompano Beach, Florida.

HARRY SHAPIRO